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IN THE

SUPREME COURT OF THE UNITED STATES

No. 979

LANG KINSEY,
Petitioner,

vs.

FLOYD HUGGINS, et al.,
Respondents.

PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS AT SAN ANTONIO

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PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS AT SAN ANTONIO

TO THE HONORABLE SUPREME COURT OF THE UNITED STATES:

PETITIONER LANG KINSEY respectfully submits this his Petition for a Writ of Certiorari to be issued to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio, to review the judgment of that Court in this cause, being Cause No. 14,573 on the docket of said Court.

OPINIONS BELOW

The opinion of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas is reported in Volume 414, at pages 208-210, of the Southwestern Reporter, Second Series, of the West Publishing Company, and a copy thereof is appended hereto as Exhibit I.

The said Court did not write an opinion in connection with its overruling of Petitioner's Motion for Rehearing. There were no opinions written in connection with the refusal of the Supreme Court of Texas to review the judgment of the said Court of Civil Appeals, or in connection with the overruling of Petitioner's Motion for Rehearing in the Supreme Court of Texas. The trial court's judgment was not reported.

GROUNDS ON WHICH THE JURISDICTION OF THE SUPREME COURT OF THE UNITED STATES IS INVOKED

In the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, Respondent attacked a judgment obtained against him by Petitioner in the District Court of Texas, asserting as the basis for his attack a right, privilege, or immunity guaranteed him by the Fourteenth Amendment to the United States Constitution. Respondent there contended that the trial court's judgment based upon personal service of a non-resident notice upon him, a non-resident of Texas, outside of the State of Texas, in a personal action against him arising out of his tortious operation of an automobile upon the highways of the State of Texas, was invalid under the holding of *Pennoyer* v. *Neff*, 95 U.S. 714, 24 L. Ed. 565 (1878) (Tr. B-1).

The said Court of Civil Appeals upheld Respondent's contention, and set aside the trial court's judgment by its judgment made and entered on the 22nd day of March, 1967 (Tr. F-1). Petitioner's Motion for Rehearing was overruled by said Court by its Order made and entered on the 19th day of April, 1967 (Tr. F-1).

Petitioner's Application for Writ of Error to the Supreme Court of Texas to review the action of the Court of Civil Appeals was refused by Order made and entered on the 27th day of July, 1967. Petitioner's Motion for Rehearing addressed to the Supreme Court of Texas was overruled by Order made and entered on the 4th day of October, 1967 (Tr. I).

Petitioner believes that jurisdiction is conferred on the Honorable Supreme Court of the United States by Title 28 U.S.C.A., Sec. 1257, Sub-paragraph (3).

THE QUESTIONS PRESENTED FOR REVIEW

Did the state appellate court correctly interpret and apply the law relating to the right, privilege, or immunity claimed by Respondent under the Fourteenth Amendment to the United States Constitution?

Did the state appellate court err in holding that the Fourteenth Amendment to the United States Constitution prevented the Texas trial court from obtaining personal jurisdiction over Respondent by means of a non-resident notice personally served upon him outside of the State of Texas in a suit arising out of his tortious operation of an automobile on the highways of the State of Texas, whereby personal injury was caused to Petitioner, a Texas resident?

CONSTITUTIONAL PROVISION INVOLVED

Amendment XIV, United States Constitution:

"Section 1. All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States, nor shall any state deprive any person of life, liberty or property without due process of law, nor deny to any person within its jurisdiction the equal protection of the laws." Constitution, U. S. Code, Vol. 1, p. xlvii.

STATEMENT OF THE CASE

Petitioner sued Respondent and others in the District Court of Kimble County, Texas, for his personal injuries and damages allegedly caused by the collision of a car driven by Respondent and one driven by another person, which collision occurred in said County, Texas (Tr. A-2, 3, 4), Petitioner alleged therein that Respondent's negligence proximately caused the collision and his resulting injuries. Respondent was personally served on April 18, 1966, by a Kansas Deputy Sheriff in Kansas, where he resided at the time, with a Non-Resident Notice issued under the authority of Rule 108, Texas Rules of Civil Procedure (Tr. A-12, 12a). A copy of Petitioner's petition commencing the suit was attached to the Non-Resident Notice (Tr. A-12a). Respondent filed no answer and made no appearance, and Petitioner in due and proper time, form and manner on May 31, 1966, was granted a default judgment against him (Tr. A-15). After the time for appeal from the said judgment had expired, Respondent in proper time and manner on November 8, 1966, sued

out a Petition for Writ of Error in the trial court (Tr. A-16, 17), and thereafter on December 12, 1966, filed his Brief with the Court of Civil Appeals detailing the alleged error of the trial court (Tr. B).

The Federal question involved was first raised by Respondent in that Brief, the opening sentence of which read:

> "This is a case in which a default judgment for $15,000.00 was rendered in the District Court of Kimble County, Texas, against a resident of Kansas based upon service of non-resident notice in Kansas, contrary to principles established nearly one hundred years ago in Pennoyer v. Neff. It is to correct this patent error that this case comes before this court on writ of error pursuant to Articles 2249, 2249a and 2225, VACS, and Rules 359-363, TRCP." (Tr. B-1).

The Brief contained three Points of Error, to wit:

> "ONE
>
> The trial court erred in rendering judgment against appellant because no valid process was ever issued or served upon appellant.
>
> TWO
>
> The trial court erred in rendering judgment against appellant because the court did not acquire jurisdiction over the person of appellant by reason of the 'Non-Resident Notice' served upon appellant.
>
> THREE
>
> The trial court erred in rendering judgment against appellant because the court had no jurisdiction over the person of appellant and therefore no power to render any judgment against appellant."

Discussion in the Brief was confined solely to the Federal question stated above (Tr. B-1 thru 8). Respondent's "Argument and Authorities" in said Brief consisted of a regime of *Pennoyer* v. *Neff* and quotations therefrom, and citations to several cases which followed and relied upon *Pennoyer* v. *Neff*, and included the following argument:

> "Thus, ever since the historic decision of Pennoyer v. Neff, it has been the law of this as well as every other state in the Union that in an action in personam the process of a state's tribunal has no legal effect upon a non-resident when served upon him beyond borders of that state. In such a case the process must be personally served upon the defendant (or his duly authorized agent for service of process) within the borders of the state by whose court the process is issued. Otherwise, the process, even though personally delivered out of the state to a nonresident defendant, is invalid. And, it goes without saying that in such an action a court has no power to render any judgment until and unless it acquires jurisdiction over the person of the defendant by the valid service of process." (Tr. B-6).

The reference to and reliance upon *Pennoyer* v. *Neff* and cases following it made up the total sum and substance of the Argument and Authorities in Respondent's said Brief.

The Court of Civil Appeals in its Opinion upholding Respondent's contention stated:

> "Appellant (Respondent here) contends that the landmark case of Pennoyer v. Neff, 95 U.S. 565, by the Supreme Court of the United States is controlling in this case." (Tr. E-1, App., Ex. I).

The Court of Civil Appeals set aside the trial court judgment, but did not express in its Opinion the grounds

for its decision. Under applicable Texas law, however, the only question before the court was the one presented by Respondent in his Argument and Authorities in his Brief in that Court, namely, the Due Process question under the United States Constitution. Although Respondent's Points of Error in said Brief were possibly broad enough to include other questions, he construed them in his Argument and Authorities as raising and he actually briefed only the Due Process question. Since in Texas state courts points of error not briefed are regarded as waived (4 Tex. Jur. 2d page 166), and since presumably the Texas Appellate Court followed Texas law, under the Brief submitted by Respondent to that Court only one ground of decision was possible if the Court ruled in his favor, i.e., that the trial court judgment was based upon citation or process which violated the Due Process clause of the Fourteenth Amendment to the United States Constitution.

Petitioner's Motion for Rehearing in the said Court of Civil Appeals specifically raised the question that the said Court had misinterpreted and misapplied the Federal Law, and these points were reiterated in his Application for Writ of Error in the Supreme Court of Texas, and in the Motion for Rehearing therein (Tr. G, H, J; Appendix, Ex. IV, V and VI). The said Supreme Court wrote no opinion in connection with its refusal of the said Application or its overruling of the said Motion for Rehearing (Tr. I, App., Ex. III).

ARGUMENT AMPLIFYING REASONS FOR ALLOWANCE OF THE WRIT

The decision of the Texas Court of Civil Appeals in this case is not in accord with applicable decisions of the Supreme Court of the United States.

It appears that the effect of *Pennoyer* v. *Neff*, 95 U.S. 714, 24 L. Ed. 565 (1878), which held that the due process clause of the Fourteenth Amendment was violated where a court rendered a personal judgment against a non-resident defendant without having jurisdiction over him, and that it could not acquire such jurisdiction by serving process upon him outside the forum or by publication, has been greatly mitigated by a number of more recent decisions of this Honorable Court, notably *Hess* v. *Pawloski*, 274 U.S. 352, 71 L. Ed. 1091, 47 S. Ct. 632 (1927); *Milliken* v. *Meyer*, 311 U.S. 457, 85 L. Ed. 278, 61 S. Ct. 339 (1940); *International Shoe Co.* v. *Washington*, 326 U.S. 310, 90 L. Ed. 95, 66 S. Ct. 154 (1945); *Olberding* v. *Illinois Central R.R. Co.*, 346 U.S. 338, 98 L. Ed. 39, 74 S. Ct. 83 (1953); and *McGee* v. *International Life Ins. Co.*, 355 U.S. 220, 2 L. Ed. 2d 223, 78 S. Ct. 199 (1957).

In *Hess* v. *Pawloski*, the Supreme Court held that service of process could be made upon a certain state official, and notice given by mail to a non-resident in his home state, where the forum state had a statute providing that use of that state's highways implied that the non-resident thereby appointed the state official as his agent for service in any case arising out of his operation of a car upon such highways, and that this was sufficient to enable the forum state's court to render a personal judgment against the non-resident.

Milliken v. *Meyer* held that a state can effectively and legally provide for service of citation upon its domiciliaries who are not residing within the state, in an in personam suit, and that such service, so long as it furnishes adequate notice to the defendant, does not offend principles of due process. The notable holding there, so far as the present case is concerned, is that personal jurisdic-

tion was obtained over the defendant through process served upon him outside the state.

International Shoe Co. v. *Washington* involved a suit against a foreign corporation by the State of Washington to enforce the collection of certain statutory payments. The company had no office or place of business in the state, but transacted business there through salesmen who called upon companies within the state. Service of process was made on the company at its office in another state by registered mail, and also upon an agent within the state. The defendant defended on the ground that the process was not sufficient to bring it before the state court, in that it offended "due process". This Court in holding the process to be sufficient, stated:

> "Historically the jurisdiction of courts to render judgment in personam is grounded on their de facto power over the defendant's person. Hence his presence within the territorial jurisdiction of a court was prerequisite to its rendition of a judgment personally binding him. Pennoyer v. Neff, 95 U.S. 714, 733, 24 L. Ed. 565, 572. But now that the capias ad respondendum has given way to personal service of summons or other form of notice, due process requires only that in order to subject a defendant to a judgment in personam, if he be not present within the territory of the forum, he have certain minimum contacts with it such that the maintenance of the suit does not offend 'traditional notions of fair play and substantial justice.'" (326 U.S. at page 316).

Although that case involved a corporate defendant, the language of the opinion does not restrict the holding of the case to such a defendant, and is not based upon the type of defendant.

The court indicated that both forms of notice were sufficient, holding that:

> "It is enough that appellant has established such contacts with the state that the particular form of substituted service adopted there gives reasonable assurance that the notice will be actual."

The court held that service of a notice by registered mail met the due process standard.

In the present case, Respondent had actual personal notice of the suit. He was personally served (Tr. A-12a).

In the *Olberding* case, the Supreme Court recognized that the non-resident motorist statutes (as in *Hess* v. *Pawloski*) were based upon a legal fiction, and not really upon physical power over the defendant, stating:

> "It is true that in order to ease the process by which new decisions are fitted into pre-existing modes of analysis there has been some fictive talk to the effect that the reason why a non-resident can be subjected to a state's jurisdiction is that the non-resident has 'impliedly' consented to be sued there. In point of fact, however, jurisdiction in these cases does not rest on consent at all. See Scott, Jurisdiction over non-resident Motorists, 39 Harv. L. Rev. 563. The defendant may protest to high heaven his unwillingness to be sued and it avails him not. The liability rests upon the inroad which the automobile has made on the decision of Pennoyer v. Neff, 95 U.S. 714, 24 L. Ed. 565, as it has on so many aspects of our social scene." (p. 341).

The *McGee* case, like the present case, involved a decision of Texas courts that a judgment recovered through service of process on an out of state resident was void under the Fourteenth Amendment because it did not give the court jurisdiction over the defendant. There the plaintiff, a resident of California, had sued the Defendant, a Texas corporation, with home office in Texas, in the California courts on a policy of insurance. The De-

fendant had no office, employees or agents in California, and its only contact with that state was that a company which it had taken over had sold a policy of insurance by mail to the Plaintiff. Defendant was not served with process of any sort in California, but rather was served by registered mail at its principal place of business in Texas. Plaintiff took a default judgment in California, and came to Texas and sued on her judgment. The Texas courts all held that the judgment was no good, that it violated the Fourteenth Amendment, and that the process used did not give the California court jurisdiction over the defendant. In ruling for the California plaintiff, this Honorable Court stated:

> "Looking back over this long history of litigation a trend is clearly discernible toward expanding the permissible scope of state jurisdiction over foreign corporations and other non residents." (355 U.S., p. 222).
>
> * * *
>
> "Turning to this case we think it apparent that the Due Process Clause did not preclude the California court from entering a judgment binding on respondent. It is sufficient for purposes of due process that the suit was based on a contract which had substantial connection with the state." (355 U.S. at p. 223).

Although in *Hanson* v. *Denckla,* 357 U.S. 235, 2 L. Ed. 2d 1283, 78 S. Ct. 1228 (1958), the Court held in favor of the non-resident defendant (holding that the cause of action was not one which arose out of an act done or a transaction consummated in the forum state), the Court there clarified and reiterated its holdings in some of the previously cited cases, stating:

> "Appellants charge that this judgment is offensive to the Due Process clause of the Fourteenth Amendment because the Florida court was without

jurisdiction. There is no suggestion that the court failed to employ a means of notice reasonably calculated to inform non-resident defendants of the pending proceedings, or denied them any opportunity to be heard in defense of their interests. The alleged defect is the absence of those 'affiliating circumstances' without which the courts of a State may not enter a judgment imposing obligations on persons (jurisdiction in personam) or affecting interests in property (jurisdiction in rem or quasi in rem)." 357 U.S. 245, 78 S Ct. 1235.

* * *

"In McGee the court noted the trend of expanding personal jurisdiction over non-residents. As technological progress has increased the flow of commerce between States, the need for jurisdiction over non-residents has undergone a similar increase. At the same time, progress in communications and transportation has made the defense of a suit in a foreign tribunal less burdensome. In response to these changes, the requirements of personal jurisdiction over non-residents have evolved from the rigid rule of Pennoyer v. Neff, 95 U.S 714, 24 L. Ed. 565, to the flexible standard of International Shoe Co. v. State of Washington." U.S. at 250, S. Ct. at 1238.

The Respondent here was personally given the non-resident notice, along with a copy of the Petitioner's petition, in the manner specified by Rule 108, and he has made no complaint that he did not have notice of the suit or an opportunity to defend himself therein. He simply sat back and ignored the Texas proceeding, until after judgment was rendered against him.

Rule 108, Texas Rules of Civil Procedure, reads in full as follows:

"*Rule 108. Defendant Without State.*

Where the defendant is absent from the State, or is a non-resident of the State, the form of notice to

such defendant of the institution of the suit shall be the same as prescribed for citation to a resident defendant; and such notice may be served by any disinterested person competent to make oath of the fact in the same manner as provided in Rule 106 hereof. The return of service in such cases shall be indorsed on or attached to the original notice, and shall be in the form provided in Rule 107, and be signed and sworn to by the party making such service before some officer authorized by the laws of this State to take affidavits, under the hand and official seal of such officer. A defendant served with such notice shall be required to appear and answer in the same manner and time and under the same penalties as if he had been personally served with a citation within this State." Vernon's Annotated Texas Rules, Rule 108.

Rules 99 through 107 deal with citation and the service and return thereof in ordinary cases. The form of the non-resident notice is in substance the same as that of the ordinary citation, and the form of the return is also in substance the same.

Rule 108 is in substance the same, and is derived from, Articles 1230 through 1234, enacted by the Texas Legislature in 1875, three years before the decision in *Pennoyer* v. *Neff*. See Sayles, Texas Civil Statutes.

By its literal terminology, Rule 108 provides method of notice to be used in all cases where the defendant is a non-resident. There are no exceptions and no qualifications. The rule does not describe or list types of cases. It simply provides a method of service wherever out of state service on a non-resident is called for.

We think that it is beyond dispute, therefore, that the notice afforded the Defendant here is as approved by the decisions of the Supreme Court of the United States. Respondent had considerably more than the "minimal contacts" with the forum state set out in the *International Shoe Co.* case, and the form of notice not only was such

as was reasonably calculated to inform Respondent of the existence of the suit against him, it did so inform him. Respondent, in using the highways of Texas, tortiously injured Petitioner. He was sued in the place where the tortious activity occurred, and was given actual notice of the filing of the suit, along with a copy of the petition commencing the suit. He had an ample opportunity in which to file an answer or enter an appearance and be heard, all of which he neglected to do.

Under the cited holdings of this Court, and the factual circumstances of this case, the non-resident notice served on Respondent was in every way sufficient to give the Texas trial court personal jurisdiction over him, and it is in no way violative of the Due Process Clause. We believe the Texas Court of Civil Appeals erred in holding to the contrary.

CONCLUSION

For the foregoing reasons, Petitioner prays the Honorable Supreme Court of the United States to issue a Writ of Certiorari to the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, and to review the judgment of that Court in this case, and reverse and render the same.

Respectfully submitted,

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EXHIBIT I, APPENDIX

Opinion of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio

(Tr. E-1 through E-4)

Floyd Huggins, Appellant,

No. 14573, v.

Lang Kinsey, Appellee.

Appeal from Kimble County.

Writ of error from a default judgment rendered in the District Court of Kimble County, Texas, against appellant, a resident of the State of Kansas, in an automobile accident personal injury case. Appellee filed suit in the District Court of Kimble County for injuries alleged to have been sustained by him as a result of an automobile collision in Kimble County involving a car being driven by appellant. Appellee's petition alleged that appellant was a resident of the State of Kansas. A "Non-Resident Notice" under the provisions of Rule 108, T.R.C.P., was personally served on appellant in Johnson County, Kansas, but no other citation was ever served upon him. Appellant filed no answer and made no appearance of any kind in said suit. Default judgment was thereafter rendered in said case against appellant in the amount of $15,000.00.

Appellant contends that no valid process in said cause was ever issued or served upon him; that the court did not acquire jurisdiction over the person of appellant by reason of such "Non-Resident Notice"; and that the trial court erred in rendering judgment against appellant because the

court had no jurisdiction over the person of appellant and no power to render judgment against him. Appellant contends that the landmark case of Pennoyer v. Neff, 95 U.S. 565, by the Supreme Court of the United States is controlling in this case. Appellee maintains that Pennoyer v. Neff has been so modified and "whittled down" by subsequent decisions of the Supreme Court, including Hess v. Pawleski, 274 U.S. 352; Millikin v. Meyer, 311 U.S. 457; International Shoe Co. v. State of Washington, 326 U.S. 310; and McGee v. International Life Ins. Co., 355 U.S. 220, that it does not apply in the case before us. These cases involve the construction of certain state statutes providing for methods of service upon non-residents, chiefly of the nature of our Non-Resident Motorist Act, Art. 2039a, Vernon's Ann.Civ.St., and our so-called "long arm" statute, Art. 2031b, Vernon's Ann.Civ.St., although Millikin v. Meyer was a suit in a Wyoming court between two citizens of Wyoming, but where notice of the suit was served upon the defendant in Colorado. The Supreme Court in that decision held that the authority of a state over one of its citizens is not terminated by the mere fact of his absence from the state, and that domicile in a state is alone sufficient to bring an absent defendant within reach of a state's jurisdiction for purpose of a personal judgment by means of appropriate substituted service. Pennoyer v. Neff has been followed by our Texas Supreme Court in York v. State, 73 Tex. 651, 11 S.W. 869; August Kern Barber Supply Co. v. Freeze, 96 Tex. 513, 74 S.W. 303; and Horst v. Lightfoot, 103 Tex. 643, 132 S.W. 761. Appellee cites no Texas cases overruling these decisions.

Appellee concedes that he could have obtained jurisdiction over appellant by service of process under the provisions of our Non-Resident Motorist Statute, Art. 2039a, supra, but instead he chose to utilize the provisions of one

of our Rules of Civil Procedure, No. 108, to obtain service on the non-resident. The case of Bonzani, Inc. v. Lee, 337 S.W. 2d 437 (1960, no writ), was a personal injury suit arising out of an automobile collision involving service of process on a non-resident under Rule 108, T.R.C.P. The Court held that the part of Rule 108 which provides for service on a defendant who is a non-resident of this State will not lend validity to plaintiff's personal judgment against defendant, and that service in the State of Oklahoma on a non-resident defendant would not support a personal judgment. The case of Roumel v. Drill Well Co., 270 F. 2d 550, involves an action brought in a Texas court against a non-resident of the State of Texas, in which citation was issued and served on the non-resident under the authority of Rule 108, T.R.C.P. The United States Court of Appeals, Fifth Circuit, stated that it is clear that Texas had not attempted by Rule 108 of its Rules of Civil Procedure to vest jurisdiction in its courts to render personal judgments against non-residents, and held that service under Rule 108 gave the court no jurisdiction to render personal judgment against the defendant. In a recent Texas case involving service on a non-resident under Rule 108, the Court held that where appellant's cause of action was in personam, citation under Rule 108 did not bring such non-resident before the court so that a personal judgment could be rendered against him, and cited Pennoyer v. Neff as its authority therefor. Henry v. Reno, 401 S.W. 2d 118, writ ref'd n.r.e.

Appellant, having now appeared to attack the judgment,[1] is presumed to have entered his appearance to the term of the court at which the mandate shall be filed. Rule 123, T.R.C.P. The default judgment against appellant

---

1. Appellant did not make any special appearance as is authorized by Rule 120a, Texas Rules of Civil Procedure.

is reversed and set aside, and the cause remanded to the trial court for a new trial.

Fred V. Klingeman
Associate Justice

Opinion delivered and filed March 22, 1967.

STATE OF TEXAS (
)
COUNTY OF BEXAR (

I, Robert L. Cook, Clerk of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, Sitting in San Antonio, Texas do hereby certify that the foregoing is a true and correct copy of The Opinion filed March 22, 1967, in Cause No. 14573, wherein Floyd Huggins, is Appellant, and Lang Kinsey, is Appellee, as the same appears of record in my office.

WITNESS Robert L. Cook, Clerk of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, Sitting in San Antonio, Texas.

GIVEN under my hand and seal of said Court, at office in the City of San Antonio, Texas, this 18th day of December, 1967.

(Seal) /s/ Robert L. Cook
Clerk of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, Sitting in San Antonio, Texas

STATE OF TEXAS (
)
COUNTY OF BEXAR (

I, Charles W. Barrow, Chief Justice of the Court of Civil Appeals for the Fourth Supreme Judicial District of

Texas, Sitting in San Antonio, Texas, do hereby certify that Robert L. Cook, whose name is subscribed to the foregoing certificate of attestation, now is and was, at the time of signing and sealing the same, Clerk of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, Sitting in San Antonio, Texas, and keeper of the Records and seal thereof, duly appointed and qualified to office; that full faith and credit are and of right ought to be given to all his official acts as such in all Courts of Record and elsewhere; and that his said attestation is in due form of law, and by the proper officer.

GIVEN under my hand and seal this 18th day of December, 1967.

/s/ Charles W. Barrow
Chief Justice of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas Sitting at San Antonio, Texas

STATE OF TEXAS (
)
COUNTY OF BEXAR (

I, Robert L. Cook, Clerk of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, Sitting in San Antonio, Texas, do hereby certify that Charles W. Barrow, whose genuine signature is appended to the foregoing certificate, was, at the time of signing the same, Chief Justice of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, Sitting in San Antonio, duly elected and qualified, that full faith and credit are and of right ought to be given to all his official acts as such, in all Courts of Record and elsewhere.

WITNESS, Robert L. Cook, Clerk of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, Sitting in San Antonio, Texas.

GIVEN under my hand and seal of said Court, at office in the City of San Antonio, this 18th day of December, 1967.

(Seal) /s/ Robert L. Cook
Clerk of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, Sitting in San Antonio, Texas

EXHIBIT II, APPENDIX

Judgments of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, at San Antonio

(On Merits, and on Motion for Rehearing)

(Tr. F-1, F-2)

JUDGMENT OF THE COURT OF CIVIL APPEALS
WEDNESDAY MARCH 22, 1967

Floyd Huggins, Appellant,

No. 14573, vs.

Lang Kinsey, Appellee.

Appealed from the second 38th District Court of Kimble County.

This cause came on to be heard on the transcript of the record, and the same being examined, it is the opinion of the Court that there was error in the judgment of the Court below. It is therefore considered, adjudged and ordered that the default judgment against Appellant is reversed and

set aside, and the cause remanded to the trial Court for a new trial, in accordance with the opinion of the Court.

It is further ordered that Appellee, Lang Kinsey, pay all costs of this Court in this behalf expended and incurred, and this decision be certified below for observance.

Order of the Court on Motion for Rehearing

WEDNESDAY, APRIL 19, 1967

Floyd Huggins, Appellant,

No. 14573, vs.

Lang Kinsey, Appellee.

Appealed from Bexar County.

The motion of Appellee for Rehearing, filed April 6, 1967, coming on to be heard, it is ordered that said motion be, and it is hereby, overruled.

STATE OF TEXAS (
)
COUNTY OF BEXAR (

I, Robert L. Cook, Clerk of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, Sitting in San Antonio, Texas do hereby certify that the foregoing is a true and correct copy of Judgment of the Court of Civil Appeals, dated Wednesday March 22, 1967, See Volume No. 17, Page No. 211 and Order of the Court on Motion for Rehearing, dated Wednesday April 19, 1967, See Volume No. 17, Page No. 217 in Cause No. 14573, wherein Floyd Huggins, is Appellant, and Lang Kinsey, is Appellee, as the same appears of record in my office.

WITNESS, Robert L. Cook, Clerk of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, Sitting in San Antonio, Texas.

GIVEN under my hand and seal of said Court, at office in the City of San Antonio, Texas, this 18th day of December, 1967.

(Seal) /s/ Robert L. Cook
Clerk of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, Sitting in San Antonio, Texas

STATE OF TEXAS (
)
COUNTY OF BEXAR (

I, Charles W. Barrow, Chief Justice of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, Sitting in San Antonio, Texas, do hereby certify that Robert L. Cook, whose name is subscribed to the foregoing certificate of attestation, now is and was, at the time of signing and sealing the same, Clerk of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, Sitting in San Antonio, Texas, and keeper of the Records and seal thereof, duly appointed and qualified to office; that full faith and credit are and of right ought to be given to all his official acts as such in all Courts of Record and elsewhere; and that his said attestation is in due form of law, and by the proper officer.

GIVEN under my hand and seal this 18th day of December, 1967.

/s/ Charles W. Barrow
Chief Justice of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, Sitting at San Antonio, Texas

STATE OF TEXAS (
)
COUNTY OF BEXAR (

I, Robert L. Cook, Clerk of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, Sitting in San Antonio, Texas, do hereby certify that Charles W. Barrow, whose genuine signature is appended to the foregoing certificate, was, at the time of signing the same, Chief Justice of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, Sitting in San Antonio, duly elected and qualified, that full faith and credit are and of right ought to be given to all his official acts as such, in all Courts of Record and elsewhere.

WITNESS, Robert L. Cook, Clerk of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, Sitting in San Antonio, Texas.

GIVEN under my hand and seal of said Court, at office in the City of San Antonio, this 18th day of December, 1967.

(Seal) /s/ Robert L. Cook
Clerk of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, Sitting in San Antonio, Texas

EXHIBIT III, APPENDIX

Judgments of the Supreme Court of Texas

(On Application, and on Rehearing) (Tr. I)

IN THE SUPREME COURT OF TEXAS

July 26, 1967

No. B-285.

Lang Kinsey	)		
	)	From Kimble	County,
vs.	)		
	)	Fourth	District.
Floyd Huggins	)		

Application of petitioner for writ of error to the Court of Civil Appeals for the Fourth Supreme Judicial District having been duly considered, it is ordered that the application be, and hereby is, refused.

It is further ordered that applicant, Lang Kinsey, pay all costs incurred on this application.

October 4, 1967

No. B-285.

Lang Kinsey	)		
	)	From Kimble	County,
vs.	)		
	)	Fourth	District.
Floyd Huggins	)		

Petitioner's motion for rehearing of application for writ of error having been duly considered, it is ordered that said motion be, and hereby is, overruled.

I, GARSON R. JACKSON, Clerk of the Supreme Court of Texas, do hereby certify that the above and foregoing is a true and correct copy of the orders of the Supreme Court of Texas in the case numbered and styled as above, as the same appears of record in the minutes of said Court under the dates shown.

WITNESS my hand and the seal of the Supreme Court of Texas, at the City of Austin, this, the 13th day of December, 1967.

(Seal)

Garson R. Jackson
Clerk
By /s/ Eugene Cervenka, Deputy.
Eugene Cervenka

EXHIBIT IV, APPENDIX

Assignments of Error, Appellee's (Petitioner's) Motion for Rehearing in the Court of Civil Appeals

(Tr. G-3 through G-6)

No. 14573

IN THE COURT OF CIVIL APPEALS

FOR THE

FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS

AT SAN ANTONIO

FLOYD HUGGINS,
Appellant

vs.

LANG KINSEY, ET AL
Appellees

APPELLEE'S MOTION FOR REHEARING

TO THE HONORABLE COURT OF CIVIL APPEALS:

COMES NOW LANG KINSEY, one of the Appellees herein, and respectfully moves the Honorable Court to set aside and vacate its judgment and opinion of March 22, 1967, by which judgment and opinion the Court reversed the judgment of the trial court herein and remanded the case for retrial, to grant Appellee a rehearing, and upon rehearing to affirm the judgment of the trial court in all things. In support whereof Appellee would respectfully show:

ASSIGNMENTS OF ERROR

I

The Court of Civil Appeals erred in holding that service of process outside of Texas on Defendant Floyd Huggins, a non-resident, under Rule 108, Texas Rules of Civil Procedure, did not authorize the rendition of a personal judgment against him on account of his tortious operation of an automobile on the highways of the State of Texas which caused personal injuries to Plaintiff, a Texas resident.

II

The Court of Civil Appeals erred in holding that, under the United States Constitution, the procedure set out by Rule 108, Texas Rules of Civil Procedure, cannot be used to obtain jurisdiction over a non-resident of Texas by serving him outside the State of Texas in an action arising out of his tortious operation of an automobile upon the highways of the State of Texas whereby plaintiff, a Texas resident, was personally injured.

III

The Court of Civil Appeals erred in holding, as it impliedly did hold, that Rule 108, Texas Rules of Civil Procedure, could not be given a literal interpretation and application in this case since to do so would authorize a procedure contrary to provisions of the United States Constitution.

IV

The Court of Civil Appeals erred in sustaining Appellant's Point of Error One, which was: "The trial court erred in rendering judgment against appellant because no valid process was ever issued or served upon appellant."

V

The Court of Civil Appeals erred in sustaining Appellant's Point of Error Two, which was: "The trial court erred in rendering judgment against appellant because the court did not acquire jurisdiction over the person of appellant by reason of the 'Non-Resident Notice' served upon appellant."

VI

The Court of Civil Appeals erred in sustaining Appellant's Point of Error Three, which read: "The trial court erred in rendering judgment against appellant because the court had no jurisdiction over the person of appellant and therefore no power to render any judgment against appellant."

WHEREFORE, Premises considered, Appellee LANG KINSEY Prays the Court that it set aside and vacate its opinion and judgment of March 22, 1967, that it grant a rehearing herein, and that upon rehearing the judgment below be affirmed in all things.

Respectfully submitted,

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Abilene, Texas

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Attorneys for Appellee,
Lang Kinsey

By /s/ Jack M. Yates

EXHIBIT V, APPENDIX

Points of Error, Petitioner's Application for Writ of Error in the Supreme Court of Texas

(Tr. H-4 through H-6)

POINTS OF ERROR

POINT OF ERROR No. I

The Court of Civil Appeals erred in holding that the trial court did not acquire personal jurisdiction over Respondent, a non-resident of Texas, by virtue of the non-resident notice served upon him outside of Texas under Rule 108, Texas Rules of Civil Procedure, in a suit arising out of his tortious operation of an automobile on the highways of the State of Texas resulting in personal injury to Petitioner, a Texas resident. (Germane to Assignments of Error I and V, Motion for Rehearing, Court of Civil Appeals)

POINT OF ERROR No. II

The Court of Civil Appeals erred in holding that the United States Constitution, and in particular the Fourteenth Amendment thereof, prevented the Texas State Court from obtaining jurisdiction over the Respondent, a non-resident of Texas, by service of process on him outside of Texas under Rule 108, Texas Rules of Civil Procedure, for purposes of a personal judgment, in a suit based upon Respondent's tortious operation of a motor vehicle on the highways of the State of Texas proximately causing personal injury to Petitioner, a Texas resident. (Germane to Assignments of Error II and III, Motion for Rehearing, Court of Civil Appeals)

POINT OF ERROR No. III

The Court of Civil Appeals erred in holding that Rule 108, Texas Rules of Civil Procedure, could not be given a literal interpretation and application in this case since to do so would authorize a procedure contrary to the United States Constitution. (Germane to Assignment III, Motion for Rehearing, Court of Civil Appeals)

POINT OF ERROR No. IV

The Court of Civil Appeals erred in holding that Rule 108, Texas Rules of Civil Procedure, did not authorize service of process on a non-resident of Texas outside of the State of Texas where a personal judgment was sought against him in a cause of action arising in Texas out of his tortious operation of a motor vehicle on the highways of the State of Texas which proximately caused personal injuries to Petitioner, a Texas resident. (Germane to Assignments of Error I, IV, V & VI, Motion for Rehearing, Court of Civil Appeals)

EXHIBIT VI, APPENDIX

Points of Error, Motion for Rehearing of Petitioner in the Supreme Court of Texas

(Tr. J-1 through J-3)

No. B-285

IN THE

SUPREME COURT OF THE STATE OF TEXAS

LANG KINSEY,
Petitioner

vs.

FLOYD HUGGINS, ET AL.,
Respondents

PETITIONER'S MOTION FOR REHEARING

To the Supreme Court of Texas:

LANG KINSEY, Petitioner herein, respectfully makes this his Motion for Rehearing herein, and as grounds and argument therefor would respectfully show:

The Honorable Supreme Court of Texas erred in not granting the application for writ of error on Point of Error No. 1, which reads:

"The Court of Civil Appeals erred in holding that the trial court did not acquire personal jurisdiction over Respondent, a non-resident of Texas, by virtue of the non-resident notice served upon him outside of Texas under Rule 108, Texas Rules of Civil Procedure, in a suit arising out of his tortious operation of an automobile on the highways of

the State of Texas resulting in personal injury to Petitioner, a Texas resident."

The Honorable Supreme Court of Texas erred in not granting the application for writ of error on Point of Error No. II, which reads:

"The Court of Civil Appeals erred in holding that the United States Constitution, and in particular the Fourteenth Amendment thereof, prevented the Texas State Court from obtaining jurisdiction over the Respondent, a non-resident of Texas, by service of process on him outside of Texas under Rule 108, Texas Rules of Civil Procedure, for purposes of a personal judgment, in a suit based upon Respondent's tortious operation of a motor vehicle on the highways of the State of Texas proximately causing personal injury to Petitioner, a Texas resident."

The Honorable Supreme Court of Texas erred in not granting the application for writ of error on Point of Error No. III, which reads:

"The Court of Civil Appeals erred in holding that Rule 108, Texas Rules of Civil Procedure, could not be given a literal interpretation and application in this case since to do so would authorize a procedure contrary to the United States Constitution."

The Honorable Supreme Court of Texas erred in not granting the application for writ of error on Point of Error No. IV, which reads:

"The Court of Civil Appeals erred in holding that Rule 108, Texas Rules of Civil Procedure, did not authorize service of process on a non-resident of Texas outside of the State of Texas where a personal judgment was sought against him in a cause of action arising in Texas out of his tortious operation of a motor vehicle on the highways of the State of Texas which proximately caused personal injuries to Petitioner, a Texas resident."

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No. 979

In the Supreme Court of the United States

OCTOBER TERM, 1967

LANG KINSEY, *Petitioner*

vs.

FLOYD HUGGINS, *Et Al, Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS AT SAN ANTONIO

BRIEF FOR RESPONDENT IN OPPOSITION

Of Counsel:
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In the Supreme Court of the United States

No. 979

OCTOBER TERM, 1967

LANG KINSEY, *Petitioner*
vs.
FLOYD HUGGINS, *Et Al, Respondents*

ON PETITION FOR A WRIT OF CERTIORARI TO THE COURT OF CIVIL APPEALS FOR THE FOURTH SUPREME JUDICIAL DISTRICT OF TEXAS AT SAN ANTONIO

BRIEF FOR RESPONDENT IN OPPOSITION

OPINIONS BELOW

The Supreme Court of Texas did not write a formal opinion, but refused Petitioner's Application for a Writ of Error by the entry of an order dated October 4, 1967 (Tr. I; Petr.'s App. p. A-10); The decision and opinion of the Court of Civil Appeals for the Fourth Supreme Judicial District of Texas, reversing the judgment of the trial court and remanding the cause for trial on the merits is reported at 414 S.W. 2d 208, and is correctly embodied in the Petition as Exhibit 1.

JURISDICTION

The jurisdictional requisites are adequately set forth in the Petition.

QUESTIONS PRESENTED

Whether a substantial Federal question is presented by the Petitioner's contention that **Pennoyer v. Neff,** 95 U.S. 714 (1878) has been so "greatly mitigated" by subsequent decisions so as to no longer be authoritative?

Whether the decision of the Court of Civil Appeals of Texas is supported by an independent and adequate non-federal ground?

STATUTES AND RULES INVOLVED

Articles 2031b (Sec. 3), 2039a (Sec. 5) of the Revised Civil Statutes of Texas, 1925, as amended, and Rule 108 of the Texas Rules of Civil Procedure are contained in the Appendix to the Respondents Brief in Opposition.

STATEMENT OF THE CASE

Petitioner brought an action in personam for damages resulting from personal injuries sustained in an automobile accident occurring within the State of Texas (Tr.A-2,3,4). The only citation issued to Respondent was a "non-resident notice" (under Tex. R. Civ. P. 108) which was purportedly served upon him in the State of Kansas (Tr. A-2,12), the state of his residence. Respondent was never served while he was present in the State of Texas nor was any citation served upon any agent of Respondent. A default judgment was taken against Respondent upon such "notice" (TR.A-15). Respondent made no appearance in any Texas court until he moved to set aside such default judgment by filing his Petition for a Writ of Error (Tr.A-16, 17, B). The Court of Civil Appeals for the Fourth Supreme Judicial District of Texas set

aside the default judgment and remanded the cause to the trial court for a new trial, basing its decision on two premises, to-wit:

(1) The cases of **Hess v. Pawloski,** 274 U.S. 352 (1927); **Millikin v. Meyer,** 311 U.S. 457 (1940); **International Shoe Co. v. State of Washington,** 326 U.S. 310 (1945), and **McGee v. International Life Ins. Co.** 355 U. S. 220 (1957) are distinguishable from **Pennoyer v. Neff, supra,** in that those cases "involve the construction of certain state statutes providing for methods of service upon non-residents, chiefly of the nature of our Non-Resident Motorist Act, Art. 2039(a), R.C.S., and our so-called "Long-Arm" Statute, Art. 2031(b), R.C.S. . . .", that **Pennoyer, supra,** had been followed by our Texas Supreme Court and that the Petitioner had cited no Texas case overruling the Texas cases following **Pennoyer, supra.**

(2) Texas law holds that the "notice" purportedly served on Respondent pursuant to **Rule 108, T.R.C.P.,** "will not lend validity" to a personal judgment taken against a non-resident of Texas. (Tr.E-1-4; Petr.'s App. Ex. 1).

The Court of Civil Appeals denied the Petitioner's Motion for Rehearing (Tr. F-1), the Supreme Court of Texas refused Petitioner's Application for a Writ of Error, and, subsequently, the Motion for Rehearing of same (Tr. I).

ARGUMENT

1. There is no substantial Federal question presented by the Petitioner's contention that **Pennoyer, supra,** is no longer authoritative law. Petitioner has cited no cases overruling **Pennoyer, supra.** The cases that Peti-

tion has cited (**Hess, McGee, supra,** etc.) are readily distinguishable on both their facts and holdings. Further, Petitioner has not pointed to any conflict of decision in either the State or Federal judiciaries. As the Texas Court of Civil Appeals noted, the cited cases do not stand for the proposition that this type of notice is effective service in an action in personam. Rather, these cases deal with the construction and interpretation of various "Long Arm Statutes", the "Minimum Contacts Doctrine", or when a non-resident has, either voluntarily or involuntarily, appointed a state official to be his agent for service of process.

In addition, Rule 108, is merely a Texas rule of procedure, and is not a substantative law. Art. 2039(a) R.C.S., commonly known as the Non-Resident Motorist Act, provides the **sole,** not merely one, means of obtaining service of process upon a non-resident motorist in any civil action growing out of any accident while such non-resident was operating a motor vehicle within this State. Section 5 of this Statute provides:

> **"No judgment by default shall be taken in any such cause or action, suit or proceeding, until after the expiration of at least twenty days after such process shall have been served upon the chairman of the State Highway Commission as herein provided,** and the presumption shall obtain, unless rebutted, that such process was transmitted by the chairman of the State Highway Commission and received by Defendant after being deposited in the mail by the chairman of the State Highway Commission." (emphasis added)

The Chairman of the Texas Highway Commission was never served with any process in this case.

2. The decision of the Court of Civil Appeals is

supported by an independent and non-federal ground in that that court specifically held that Texas law provides that this means of service is inadequate to vest jurisdiction over the non-resident defendant. The court cited three cases in support of this statement; **Bonanza, Inc., v. Lee,** 337 S.W. 2d 437, (Tex.Civ.App.1960) no writ hist., **Henry v. Reno,** 401 S.W. 2d 118 (Tex.Civ. App. 1966) writ ref. n.r.e. and **Roumel v. Drill Well Oil Company,** 270 F.2d 550 (5th Cir. 1959). In **Roumel, supra,** the Court stated:

> "It is clear that Texas has not attempted, by Rule 108 of its Rules of Civil Procedure or by any means, to vest jurisdiction in its courts to render personal judgments against non-residents. Wherever it has been drawn in question, Rule 108 has been held to be nothing more than a notice to a non-resident of the pendency of a suit **involving property** within the State of Texas." At 554. (Emphasis added)

The Court of Civil Appeals in the case at bar also noted that a recent Texas case clearly held that notice purportedly served on a non-resident, pursuant to Rule 108, did not bring the non-resident defendant within the jurisdiction of the state court, so that an in personam action could be prosecuted against him, citing **Henry, supra.**

3. The Court of Civil Appeals correctly held that under both State and Federal decisions, the purported "notice" given Respondent was not effective personal or substituted service and, therefore, the trial court had no jurisdiction over the person of the Respondent. As the Court of Civil Appeals noted, and as the Petitioner there conceded (Tr. D-17), had the provisions

of Article 2039a (the Texas Non-Resident Motorist Act) been employed, Petitioner could have obtained service and thereby vested the trial court with personal jurisdiction over the Respondent. The Petitioner, however, chose to rely on a procedural rule that had been held by both Federal and Texas courts to be an ineffective method of obtaining service on a non-resident defendant. The Court of Civil Appeals noted that no case had been cited in which the principles of the **Pennoyer, supra,** had been overruled. Therefore, the court held that such "notice" was indeed invalid service. Clearly, this decision was correct.

Petitioner contends that the landmark decision in **Pennoyer, supra,** has been "greatly mitigated" by the more recent decisions of this Honorable Court, such as **Hess, Milliken, supra,** etc. The Respondent disagrees. The doctrine of **Pennoyer, supra,** is still the law and state lines may not be crossed for service of process upon non-residents. The cases Petitioner has cited do not hold otherwise. They merely uphold other methods of service which in fact do not require the crossing of state borders for purposes of delivery of process. It is solely by such means that effective service of process may be had upon non-residents.

Petitioner argues that the type of notice contemplated by Rule 108 of the Texas Rules of Civil Procedure was "sufficient" to give the Texas trial court jurisdiction over the Respondent. Petition has cited no case which supports this proposition; the only apposite case cited by Petitioner holds directly to the contrary, namely, **Pennoyer, supra.** The basic and fundamental holding of **Pennoyer, supra,** is simply that

under our constitutional plan of government, process issued by a state's tribunal is ineffective when served beyond the territorial borders of that state upon a non-resident in an action in personam.

CONCLUSION

For the foregoing reasons, Respondent prays the Honorable Supreme Court of the United States to deny the Petitioner's Writ of Certiorari.

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San Antonio, Texas 78205
Attorney for Respondent
FLOYD HUGGINS

Of Counsel:
GROCE, HEBDON, FAHEY & SMITH
911 Frost Bank Building
San Antonio, Texas 78205

CERTIFICATE OF SERVICE

I certify that a copy of the foregoing Brief for Respondent in Opposition to the Petition for a Writ of Certiorari was mailed to H. L. Hays, Jr., P. O. Box 5025 Abilene, Texas 79605 this....day of January, 1968.

.....
JOSH H. GROCE

....., 1968

APPENDIX

Art 2031(6) (Sec. 3) Any foreign corporation, association, joint stock company, partnership, or non-resident natural person that engages in business in this State, irrespective of any Statute or law regarding designation or maintenance of residence agents, and does not maintain a place of regular business in this State or a designated agent upon whom service may be made upon causes of action arising out of such business done in this State, the act or acts of engaging in such business within this State shall be deemed equivalent to an appointment by such foreign corporation, joint stock company, association, partnership, or non-resident natural person of the Secretary of State of Texas as agent upon whom service of process may be made in any action, suit or proceedings arising out of such business done in this State, wherein such corporation, joint stock company, association, partnership, or non-resident natural person is a party or is to be made a party.

Art. 2039a (Sec. 5) No judgment by default shall be taken in any such cause or action, suit or proceeding, until after the expiration of at least twenty days after such process shall have been served upon the Chairman of the State Highway Commission as herein provided, and the presumption shall obtain, unless rebutted, that such process was transmitted by the Chairman of the State Highway Commission and received by the defendant after being deposited in the mail by the Chairman of the State Highway Commission.

Rule 108. Where the defendant is absent from the State, or is a non-resident of the State, the form of notice to such defendant of the institution of the suit shall be the same as prescribed for citation to a resident defendant; and such notice

may be served by any disinterested person competent to make oath of the fact in the same manner as provided in Rule 106 hereof. The return of service in such cases shall be indorsed on or attached to the original notice, and shall be in the form provided in Rule 107, and be signed and sworn to by the party making such service before some officer authorized by the laws of this State to take affidavits, under the hand and official seal of such officer. A defendant served with such notice shall be required to appear and answer in the same manner and time and under the same penalties as if he had been personally served with a citation within this State.